



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL APPEAL NUMBER 598 OF 2009**

**ROBERT NJUGUNA KAMAU. ....1<sup>ST</sup> APPELLANT**

**MOSES MPESHA KOIKAI. .... 2<sup>ND</sup> APPELLANT**

**VERSUS**

**KIRIKA KAMUNGU. .... RESPONDENT**

*(From the judgment and decree of A. Ileri (Ms), Senior Resident Magistrate in Nairobi Commercial Courts CMCC NO. 289 of 2008)*

**J U D G M E N T**

The Appellants, in a plaint filed at the court, sought mainly an eviction order and general damages for trespass. The other reliefs sought were those to effect the order of eviction when granted and costs. The honorable trial magistrate refused to grant eviction orders. That aggrieved the plaintiffs who appealed to this court in this appeal.

In the said plaint dated 29<sup>th</sup> February, 2008 the plaintiffs pleaded that L.R. No. Dagoretti/Mutuini/559, was registered in the name of Paul Kamau Njuguna who was their own father but who was deceased. They further pleaded that they applied and obtained the confirmed grant of Letters of Administration of their father's estate which inter alia consisted of the said plot of land as part of the estate. They accordingly sought eviction of the Defendant who was in occupation stating that he illegally, unlawfully and wrongfully occupied the land. The Plaintiff/Appellants further pleaded that occupation of the land by the Defendant had prevented Plaintiffs from taking possession thereof and had prevented final distribution of the Estate as per the Grant of Letters of Administration issued and confirmed by the Nairobi High Court Succession Cause No. 21 of 1999.

In his defence to the lower court case, the Defendant had admitted being in possession and for many years since 1932. He also had claimed that he had a beneficial interest in the land because it was an ancestral land registered in the name of Plaintiffs' father Paul Kamau Kirika, as the eldest son of their grandfather and as a customary trustee for the benefit of all his brothers, of whom the Defendant was one, being an adopted step-brother. He averred that Grandfather had two Houses Mikki House and Njeri House. He pleaded that he belonged to the 1<sup>st</sup> House while the Plaintiffs belonged to the 2<sup>nd</sup> House – Njeri House.

The Defendant had further pleaded that his long an unchallenged notorious possession of the land was because of the familiar relationship aforesaid which also confirmed the existence of the separate

rights of the two houses.

As to an existing caution entered against the land, the Defendant had pleaded that it was entered by Mikki Njuguna when she wanted a portion of the land between the Houses of Mikki and that of Njeri.

Further, the Defendant had also pleaded that although he had himself in 1997 taken out a Grant of Letters of Administration taking into account the land L.R. Dagoretti/Mutuini/559, the same was nullified by the High Court that granted the Grant of Letters of Administration to the Plaintiffs and this led the High Court to dismiss his application seeking revocation of the Grant of letters issued to the Plaintiffs.

Finally, the Defendant denied that although the property was registered in the name of the Plaintiff's father who was the Defendant's step-brother, he the Defendant was never a trespasser on the land and lived thereon by right as a beneficial owner or part beneficial owner to the knowledge of the Plaintiffs.

In her judgment, the trial magistrate found that trespass by the Defendant (Respondent) had not been proved sufficiently to enable her to order an eviction against him. She accordingly dismissed the suit, provoking this appeal.

I have carefully perused the pleadings, the evidence adduced at the lower court and, the honourable trial magistrate's judgment. I have also examined and considered the grounds of appeal and the written submissions by both sides.

In my view and finding the trial court's judgment is entirely based upon the pleading of the Plaintiffs in their plaint. The mainly had sought eviction of the Defendant from the land L.R. Dagoretti/Mutuini/559 on the basis that the Defendant was a trespasser who had no reasonable or lawful excuse of possession of the same. The trial court and indeed, this court found and finds, respectively, that Defendant may possibly have a reasonable or lawful excuse to be on the land.

There was evidence that the Defendant may have stayed on the land since 1932. Indeed, the Plaintiffs themselves suggested a long occupation of the land by the Defendant. They agreed that Defendant's father was a brother to Plaintiff's grandfather. They agreed that they were themselves born at Ngong where they grew up and have themselves never been in occupation. They agreed that the land in dispute was family ancestral land and that their father was registered as the owner as the eldest of the brothers.

The Plaintiffs did not explain how the Defendant came to occupy the land in 1932. They did not challenge or controvert the Defendant's claim that he was given the land by the Plaintiff's step-grandmother Mikki who lived on the land together with their grandmother Njeri. They also failed to challenge and controvert the Defendant's pleadings and evidence to the effect that the registration of their father as the owner of the disputed land was a customary trust because he was the eldest of his brothers and step brother. And finally, the plaintiff did not challenge or controvert the Defendant's evidence that Step-mother Mikki, customarily adopted the Defendant after she paid dowry to Defendant's mother because, she, Mikki, did not have children of her own.

In this court's view and finding proof of ownership of L.R. No. Dagoretti/Mutuini/559, was only incidental to the main cause of action of the plaintiff's which was eviction on the basis of trespass. To prove trespass, the plaintiff who alleged it had to prove ownership as well as the fact that possession by the Defendant was unlawful and without reasonable excuse. The trial court found that although the land was indeed registered in the name of Plaintiff's father, the Defendant's occupation and possession, may be with reasonable or lawful excuse. Hence she could not feel justified to order eviction as the possession could be excusable. That is to say that the occupation or possession was long and may have originally been justified. That the possession was all long known, not only to the plaintiff's grandparents, but also to their father and the Plaintiffs themselves, was a factor which must have also been in the mind of trial court.

In conclusion, the ownership of the land was not the direct relief sought or made an issue before the

trial court. Had the appellants sought a declaration of the ownership of the land in dispute, the parties and court would have examined the evidence thereof. What they sought was eviction on the basis of trespass which the court dismissed for lack of evidence that the defendant had no reasonable excuse to be in possession.

All the grounds of evidence are based on issues of ownership of the land in dispute which has not been disputed. What was required was the evidence that Defendant had no reasonable or lawful excuse to be in occupation such evidence was not adduced. The result is that this appeal has no merit. It is dismissed with costs to the Respondent.

It should be noted however, that the ownership of the land in dispute and whether the plaintiffs or the Defendant is/are entitled thereto, is an open question. The Plaintiffs have a lawful Grant of Letter of Administration and have power to distribute the same to those entitled. The Defendant may be entitled to the whole or part thereof as he may prove. If he is not included in the list of beneficiaries, he may probably file an objection to the Grant of Letters of Administration issued to the Plaintiffs so that he gets a chance to prove his beneficial interest. This final expression, is however, entirely obiter.

**Dated and delivered at Nairobi this 9<sup>th</sup> day of April 2014.**

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**D A ONYANCHA**

**JUDGE**